ceedings in equity.[16] On the other hand, even in these states, the purchaser at sheriff's sale will ordinarily be protected if he buys without notice of the vendee's rights.[17]

PENALTY OR LIQUIDATED DAMAGES.—In deciding whether a sum stipulated to be paid on breach of a contract is liquidated damages or merely a penalty to secure performance of the contract, the intention of the parties is an important factor, but not always the controlling one.[1] It is the duty of the courts to enforce the contracts of competent parties as made, where they do not conflict with any rule of law or public policy; and contracts which fix damages are as lawful as any others, within certain limitations.[2] The law has adopted the principle of just compensation for the loss or injury actually sustained, and it will not permit the parties to set aside this fundamental rule.[3] Yet a court will disregard the agreement only where it is obvious that the principle of compensation has been disregarded,[4] and some courts say that intention must always govern.[5] This conflict is more apparent than real, however; the courts take such liberties in determining the intention of the parties[6] as to make it evident that the real question in this class of cases is, not what the parties intended, but whether the sum is, in fact, a penalty.[7] But if the subject matter of the contract is such that the parties might legally fix the damages, their intention one way or the other is decisive.[8] As the courts disregard such agreements in so many instances, it seems that they might better regard them in every case as merely *prima facie* evidence of the actual damages, varying in weight according as the damages were readily ascertainable or not.

---

[16]See Baldwin *v.* Thompson (1864) 15 Iowa, 504; Taylor *v.* Lowenstein (1874) 50 Miss. 278; Tally *v.* Reid (1875) 72 N. C. 336.

[17]Rogers *v.* Hussey (1873) 36 Iowa, 664; see Taylor *v.* Lowenstein, *supra.* The position of the court in Jones *v.* Howard, *supra,* that though an execution purchaser acquires nothing, he would be protected if he bought without notice, seems self-contradictory.

[1]Wilkinson *v.* Colley (1894) 164 Pa. 35, 30 Atl. 286.

[2]Crisdee *v.* Bolton (1827) 3 C. & P. 240; Sun Printing & Pub. Ass'n. *v.* Moore (1902) 183 U. S. 642, 660 *et seq.,* 22 Sup. Ct. 240; Parker-Washington Co. *v.* City of Chicago (1915) 267 Ill. 136, 107 N. E. 872.

[3]Jacquith *v.* Hudson (1858) 5 Mich. 123; Gillilan *v.* Rollins (1894) 41 Neb. 540, 59 N. W. 893; Elzey *v.* City of Winterset (1915) 172 Iowa, 643, 154 N. W. 901.

[4]Jacquith *v.* Hudson, *supra;* Baltimore Bridge Co. *v.* United Rys. & El. Co. of Baltimore (1915) 125 Md. 208, 93 Atl. 420; Adler *v.* Kramer (1903) 39 Misc. 642, 80 N. Y. Supp. 624.

[5]Bilz *v.* Powell (1911) 50 Colo. 482, 117 Pac. 344.

[6]Seeman *v.* Biemann (1900) 108 Wis. 365, 84 N. W. 490; Wilhelm *v.* Eaves (1891) 21 Ore. 194, 27 Pac. 1053; City of York *v.* York Rys. (1910) 229 Pa. 236, 78 Atl. 128. The term the parties have given to the sum is not decisive; Scofield *v.* Tompkins (1880) 95 Ill. 190; Gay Mfg. Co. *v.* Camp (4 C. C. A. 1895) 65 Fed. 794; Caesar *v.* Rubinson (1903) 174 N. Y. 492, 67 N. E. 58; the court determines from the facts as a whole the view that equity and good conscience ought to take of the case. Streeper *v.* Williams (1865) 48 Pa. 450; Chicago House Wrecking Co. *v.* U. S. (7 C. C. A. 1901) 106 Fed. 385.

[7]Jacquith *v.* Hudson, *supra,* at p. 136; Gay Mfg. Co. *v.* Camp, *supra.*

[8]Jacquith *v.* Hudson, *supra.*

There are several rules limiting the right of the parties to fix the damages in advance. They cannot do so where damages from the breach can be actually ascertained by a court and jury,[9] nor can they provide for damages grossly disproportionate to the injury.[10] Where one sum is stipulated to be paid on the breach of any or all of a number of independent covenants varying in importance, and the damages from the breach of one or more of these covenants can be readily ascertained, that sum is a penalty.[11] It seems that the same rule should apply even where the damages resulting from all of the breaches are uncertain, if it is clear that the same sum could not possibly be a fair compensation in all cases.[12] In cases of doubt, the tendency of the courts is to construe such a provision as one for a penalty to secure the performance of the contract, as the injured party will then be limited to the damages he has actually sustained.[13]

Lease contracts frequently provide for the deposit by the tenant of a certain sum of money as security for his performance of a number of covenants of varying importance, breaches of some of which are usually capable of accurate valuation.[14] While the courts seldom allow a defaulting vendee to recover money deposited in part payment,[15] they generally construe a deposit by a tenant in default as a penalty.[16] This has been explained on the ground that the latter case

---

[9]Scofield *v.* Tompkins, *supra*. But where damages are at all uncertain, the parties ought to be allowed to stipulate them in advance, Williams *v.* Green (1854) 14 Ark. *315, for the law adopts the estimate of the parties in such cases as the best mode of ascertaining just compensation. Jacquith *v.* Hudson, *supra*.

[10]Gay Mfg. Co. *v.* Camp, *supra*; Elzey *v.* City of Winterset, *supra*; see Baltimore Bridge Co. *v.* United Rys. & El. Co. of Baltimore, *supra*.

[11]Colonna Dry Dock Co. *v.* Colonna (1908) 108 Va. 230, 61 S. E. 770; Chicago, B. & Q. R. R. *v.* Dockery (8 C. C. A. 1912) 195 Fed. 221; see Wallis *v.* Smith (1882) 21 Ch. D. 243. Likewise where the same sum is payable for a total or partial breach, Zenor *v.* Pryor (1914) 57 Ind. App. 222, 106 N. E. 746, or irrespective of the time of the breach in a case where the amount of damages would be controlled mainly by the time of the breach. Florence Wagon Works *v.* Salmon (1910) 8 Ga. App. 197, 68 S. E. 866. The sum must be susceptible of being regarded as liquidated damages as to all the provisions to which it extends, or it will not be so regarded as to any of them. Whitfield *v.* Levy (1871) 35 N. J. L. 149. But it may be upheld as liquidated damages if the parties intended it to apply only to a breach of the contract as a whole. Brownold *v.* Rodbell (1909) 130 App. Div. 371, 114 N. Y. Supp. 846.

[12]Lyman *v.* Babcock (1876) 40 Wis. 503, 518; *cf.* Wallis *v.* Smith, *supra*; Cotheal *v.* Talmage (1854) 9 N. Y. 551; Emery *v.* Boyle (1901) 200 Pa. 249, 49 Atl. 779.

[13]Bernstein *v.* Heinemann (1898) 23 Misc. 464, 51 N. Y. Supp. 467; Moore *v.* Kline (1914) 26 Colo. App. 334, 143 Pac. 262; Advance Amusement Co. *v.* Franke (1915) 268 Ill. 579, 109 N. E. 471. While this point is generally raised by the party in default, the injured party may also take advantage of it, for the latter may recover his actual damages even though they be in excess of the sum designated. Evans *v.* Moseley (1911) 84 Kan. 322, 114 Pac. 374.

[14]See Advance Amusement Co. *v.* Franke, *supra*.

[15]Moore *v.* Durnam (1902) 63 N. J. Eq. 96, 51 Atl. 449.

[16]Hecklau *v.* Hauser (1904) 71 N. J. L. 478, 59 Atl. 18; Feinsot *v.* Burstein (1914) 161 App. Div. 651, 146 N. Y. Supp. 939, aff'd. 213 N. Y. 703, 108 N. E. 1093.

is not one of partial performance like the former,[17] or that the equitable principle of avoiding forfeiture has been applied in one case but not the other.[18] A landlord dispossessing a tenant in default waives his right to the deposit except to the extent of the damages sustained before entry, since he has elected to use the remedy of re-entry instead.[19] The dispossessory proceedings cancel the lease and all obligations of both parties under it,[20] except those expressly provided to survive.[21] In the absence of such surviving obligations the breach by the tenant is complete and damages are fixed and definite at the time of the dispossession, and hence it is not a case in which the parties may liquidate the damages in advance.[22] This view was followed in the recent case of *Fleisher* v. *Friob* (N. Y. Sup. Ct. App. Term, 1916) 56 N. Y. L. J. 663, where a tenant who had been removed from the premises for non-payment of rent was allowed to recover a deposit placed with his landlords as security under the lease, deducting the rent due at the time of his removal. As the parties failed to provide that the covenant to pay rent should survive the termination of the lease in the event in which it took place, and as the deposit was made to secure the performance of a number of covenants differing radically in their nature and importance, the provision was held to be one for a penalty, despite the fact that the contract used the term "liquidated damages".

SALE OF ACCOUNTS RECEIVABLE WITH GUARANTY AT DISCOUNT AS USURY.—Usury is best defined as the taking of more interest for the use of money than the law allows.[1] Of course, then, there can be no usury where the transaction sought to be set aside was a *bona fide* sale and not a provision for a loan on the security of the property transferred as collateral.[2] In the main, the difference between these two transactions is that in the loan the title to the property is not conveyed, while in the sale it is;[3] in a loan on security there is always a

[17]Chaude *v.* Shepherd (1890) 122 N. Y. 397, 25 N. E. 358. On the other hand, where the deposit is made as an advance payment on the rent, a tenant removed from the premises for his own default cannot recover it. Galbraith *v.* Wood (1914) 124 Minn. 210, 144 N. W. 945; but *cf.* Cunningham *v.* Stockton (1910) 81 Kan. 780, 106 Pac. 1057.

[18]Cunningham *v.* Stockton, *supra*; see D'Appuzo *v.* Albright (N. Y. City Ct. 1902) 76 N. Y. Supp. 654.

[19]It makes no difference whether the deposit is made as a penalty or as liquidated damages, since the landlord by entering avoids the contract and waives damages for its breach. Wilson *v.* Agnew (1913) 25 Colo. App. 109, 136 Pac. 96; see *contra,* Barrett *v.* Monro (1912) 69 Wash. 229, 124 Pac. 369.

[20]Wilson *v.* Agnew, *supra*; N. Y. Code Civ. Proc. § 2253.

[21]Anzalone *v.* Paskusz (1904) 96 App. Div. 188, 89 N. Y. Supp. 203. But the contract must state clearly that the obligation is to survive summary proceedings in dispossession as well as common law re-entry by ejectment. Michaels *v.* Fishel (1902) 169 N. Y. 381, 62 N. E. 425.

[22]Feinsot *v.* Burstein, *supra.*

[1]3 Parsons, Contracts (9th ed.) *107.

[2]Webb, Usury, 71; White *v.* Anderson (1912) 164 Mo. App. 132, 147 S. W. 1122.

[3]Eiland *v.* Radford (1845) 7 Ala. 724; Lee *v.* Kilburn (1855) 69 Mass. 594; *In re* Grand Union Co. (2 C. C. A. 1915) 219 Fed. 353.